



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Divorce Cause 51 of 2006**

**PIUSH GULABCHANDI LADHA SHAH.....APPLICANT**

**VERSUS**

**SHRUTI CHANDRAKUMAR SHAH .....RESPONDENT**

**JUDGMENT**

The petitioner PIUSH GUCABCHAND LADTHA SHAH filed a petition on 11<sup>th</sup> April 2006 through his counsel J.N. GACHUIGA & Co. advocates. The respondent is named as SHRUTI CHANDRAKUMAR SHAH.

It is averred in the petition that the petitioner married the respondent on 14/2/1992 in Mumbai India in a Hiundu customary marriage. Subsequently, on 29/4/1992 the said marriage was converted to a statutory marriage in the Registrar's office at Nairobi. It is also averred that the petitioner and the respondent cohabited in Nairobi after their marriage. It is also averred that the petitioner is domiciled in Kenya and that the respondent is domiciled in Kochi India. It is also averred that there is no issue of the said marriage.

The ground for seeking dissolution of marriage is given in the petition as cruelty. Particulars of cruelty were listed in the petition. The petitioner avers that the marriage has irretrievably broken down.

The respondent was served with the petition. She filed a reply in person, that the allegations in the petitioner against her were not true. She relied on a letter which she wrote to the petitioner dated 17<sup>th</sup> February 2006, of which she said the petitioner had not responded to to-date.

Even through the respondent was served and filed some documents, the Deputy Registry on 19/10/2006, on application by counsel for the petitioner, certified the case to proceed as an undefended cause. However, it was said that the respondent was served with a hearing notice by registered post. She did not attend at the hearing, and, I proceeded to hear the case in the absence of the respondent.

Having perused the hearing notice sent to the respondent, it was clearly misleading. The Notice said that the hearing would be on 7/2/2007 at the Chief Magistrate's Court, Milimani. The Chief Magistrate's Court, Milimani Commercial Courts is certainly different from the High Court, Family Division. Secondly, the Milimani Courts are different and located in a different place from the High Court Family Division Nairobi. The hearing notice was certainly misleading and counsel for the petitioner also misled this court.

Be that as it may, on the hearing date that is 8/2/2007 Mr. Okulo appeared for the petitioner. Only the petitioner gave evidence.

It was his evidence that he was an accountant working in Nairobi in a food manufacturing business. He got married to the respondent in India under Hindu customs on 14/2/1992. Thereafter they converted the marriage to a civil marriage under the Marriage Act (Cap. 150) in the Registrar's office Nairobi on 29/4/1992. He produced the marriage certificate as an exhibit.

He testified that the couple cohabited at Westlands, Loresho and then Westlands Nairobi. They did not have children of the marriage. The respondent moved of the matrimonial home out in on 11/5/2005. She went to India. She was to come back on 13/7/2005. She did not come back. The petitioner booked for her to travel back to Kenya on 9/9/2005. Again, she did not come back. He testified that he had spoken to her Company but to no avail. Instead, the respondent wrote a letter stating that she would only come back (to Kenya) on condition that she gets a share in his father's business, and that he petitioner buys her a separate flat in India. He produced the letter as an exhibit.

He also testified that, for five years before her departure, there was no sexual relations between the couple. His desires were resented by the respondent. He contended that the marriage would not be saved. The respondent had even advertised herself on internet as a divorced woman.

I have considered the petition, the documents filed and evidence tendered before me. The petitioner claims that the ground for seeking dissolution of marriage is cruelty. However, the particulars given and evidence tendered relate to desertion rather than cruelty. There is no evidence of any cruel act. That would hurt body or feelings or any insult. The respondent left the matrimonial home in 2005. She has not come back. The efforts of the petitioner to get her back have only resulted in the respondent writing to him a letter dated 17<sup>th</sup> February 2006 making a number of demands. That does not amount to cruelty.

Under section 8(1) (b) of the Matrimonial Causes Act, desertion is a ground for dissolution of a marriage. However, the desertion has to be for at least three years before presenting the petition in court. The said section provides –

**“8 (1) A petition for divorce may be presented to the court either by the husband or the wife on the ground that the respondent –**

**(b) has deserted that petitioner without cause for a period of at least three years immediately preceding the presentation of the petition”**

The alleged desertion having occurred in May 2005 and the petition having been presented in court on 11<sup>th</sup> April 2006, this does not satisfy the legal requirements. This petition was presented to court prematurely. It is incompetent, and has to be dismissed on that account.

For the above reasons, I dismiss the petition herein. I order that each party do bear their own costs of the proceedings. For the avoidance of doubt, I wish to state that the petitioner can, if he so desires, file proceeding on grounds of desertion after three years from the alleged date of desertion.

It is so ordered.

DATED and delivered at Nairobi this 7<sup>th</sup> day of May 2007.

George Dulu

Judge